IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.255 OF 2006
WITH
CIVIL APPLICATION NO.329 OF 2006

Mr.Jethalal Ratanshi Patel. ..Appellant.

V/s.

The Municipal Corporation of
Gr. Mumbai. ..Respondent.

Mr.Vijay Hegde for Appellant.

Mr.A.Y.Sakhare, Sr.Advocate with Mrs.Geeta Joglekar for Respondent-BMC.

CORAM: A.M.KHANWILKAR,J

DATE : MAY 2, 2006.

P.C. :

1. Heard counsel for the parties.

2. The first argument canvassed before this Court is that no notice under section 296 of the Act was issued and straightway notice under section 314 of the Act was served on the appellant. According to the appellant, structure was in existence prior to 1995 at the place in respect of which the suit notice was issued. In other words, it is contended that the road line has been altered recently in which case, the question of straightway invoking section 314 does not arise. The argument clearly overlooks the

observation made by the trial Court that no relief has been claimed in the suit questioning the recent decision taken by the Corporation to alter the road line dated 25th July, 2003. That decision has not been challenged by the appellant. Be that as it may, the fact remains that the suit structure is clearly falling within the road line.

3. Counsel for the Corporation has produced photograph, which fortifies the case of the Corporation that the suit structure is falling within the road line. Counsel for the appellant on instruction states that the photograph as produced across the bar is not disputed. But the court will have to consider that aspect in the light of the stand taken on merits. In my opinion, no fault can be found with the conclusion reached by the court below that the action proceeded in respect of the suit structure under section 314 is legitimate and proper.

4. The counsel for the appellant would then contend that the structure in question is in existence prior to 1995, for which photo-pass has been issued by the competent authority. This submission clearly overlooks the finding recorded by

the Court below, with which I am in agreement that the Photo-pass relied upon by the appellant bearing Census No.KWX 82/1/2 produced by the appellant is not found in the record of the State Government at all. Besides, the location of the suit structure herein does not correspond. With this kind of evidence, the conclusion reached by the Court below is inevitable. The Court below has rightly taken into account the relevant circumstances to conclude that the suit structure comes within the road line and which position is fortified from the photographs and cannot be in dispute and has been accepted by the appellant before this Court. In this view of the matter, the fact that the road line has been changed subsequently, will make no difference to the invocation of action under section 314 of the Act which was available to the Corporation. The fact that the appellant would be entitled to alternate premises will have to be established by the appellant at the trial. At this stage of the proceedings, as the photo-pass produced by the appellant has not been accepted, the question of his entitlement for alternate premises does not arise. Accordingly, this appeal should fail.

5. Counsel for the appellant had also argued

that the entire action of the corporation is vitiated on account of malafide and colourable exercise of power of officers of the Corporation. It is not possible to accept this argument at this stage of the proceedings. The issue as to whether the action is malafide in fact will have to be established. For the time being, no fault can be found with the approach of the lower court or with the conclusion reached about the offending suit structure.

6. It was also argued on behalf of the appellant that the nature of order passed by the lower Court is clearly in excess of jurisdiction. It is submitted that the Court below could not have directed appointment of court receiver in the suit preferred by the appellant. There is no substance in this submission. The operative order as passed by the trial Court, in my opinion, is the just order passed in the circumstances of the case in public interest. This is so because if the appellant failed to hand over the possession of the suit structure within specified time, then it was obviously open for the corporation to proceed with the demolition action but instead the court below has found it appropriate to appoint court receiver to take over possession of the disputed property and hand over the same to the

Corporation by carrying out necessary inventory. Such direction in fact, will be in the interest of the appellant and not prejudicial, in the event the appellant fails to vacate the premises within the stipulated time.

7. On this reasoning, the appeal should fail being devoid of merits. Hence the appeal is dismissed.

8. It will be open to the appellant to seek appropriate relief and amendment of the plaint as may be advised which request if made will be considered on its own merits in accordance with the law.

9. At this stage, counsel for the appellant seeks continuation of interim protection granted by this court. I see no reason to show this indulgence. This is so because, granting stay would affect further activities of extension of road, which is in public interest. As is mentioned earlier , the question whether the appellant is entitled for alternate accommodation will have to be resolved at the end of the trial. The fact remains that the structure will have to be removed for extension/widening of the road. Hence, prayer for

continuation of interim protection does not arise. The same is rejected.

10. As this appeal is dismissed, the direction given by the trial court stands revived. As per that direction the appellant was required to hand over the possession within two weeks from 14th March, 2006. That period is already over. The Appellant to hand over vacant possession of the suit structure by 5th May, 2006, failing which it will be open to the Corporation to proceed against the suit structure in accordance with the law.

11. Appeal as well civil application disposed of on the above terms.